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Federal Deposit Insurance Corporation, sucessor-in-interest to Cenetennial Bank, Inc., and Richard W. Jones, Trustee v. Gary D. McDonald, Lynnea J. McDonald, G&L Mac, Inc., Casey Florence and Bradford E. Taylor as beneficiaries; Chad C. Shattuck and Stanford A. Graham, as trustees; Gray Excavation, Inc. : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

FEDERAL DEPOSIT INSURANCE CORPORATION, successor-in-interest to CENTENNIAL BANK, INC., and RICHARD W. JONES, Trustee,	:	
Plaintiff/Appellee and Cross-Appellant,	:	
vs.	:	Case No.: 20100356
GARY D. McDONALD, LYNNEA J. McDONALD, G&L MAC, INC.; CASEY FLORENCE and BRADFORD E. TAYLOR, as Beneficiaries; CHAD C. SHATTUCK and STANFORD A. GRAHAM, as Trustees; GRAY EXCAVATION, INC.;	:	**Oral Argument Requested**
Defendants/Appellants.	:	

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT FEDERAL DEPOSIT INSURANCE CORPORATION

APPEAL AND CROSS-APPEAL FROM MEMORANDUM DECISIONS OF OCTOBER 6, 2009 AND DECEMBER 3, 2009 AND JUDGMENT ENTERED IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, JUDGE ROBERT P. FAUST

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INTRODUCTION

The appeal in this matter arises from the trial court's grant of Appellee/Cross-Appellant Centennial Bank, Inc., predecessor in interest to the Federal Deposit Insurance Corporation (the "Bank")'s motion for partial summary judgment based upon Utah's After-Acquired Title statute, U.C.A. § 57-1-10. In summary, the trial court found the Bank's June 2, 2006 deed of trust has priority over Taylor's September 6, 2006 deed of trust even though the Bank's deed of trust was executed by Gary McDonald at a time the property was owned by his corporation because by operation of the After-Acquired Title statute, a December 22, 2006 special warranty deed from the corporation to McDonald caused title to vest in McDonald on June 2, 2006.

The cross-appeal in this case arises out of the trial court's denial of the Bank's motion for partial summary judgment on its equitable claim of reformation. The trial court denied reformation even though the undisputed facts established that the Bank was entitled to reformation of the December 22, 2006 special warranty deed to be effective June 2, 2006, based upon a scrivener's error and/or mutual mistake of the parties.

Because the trial court's ruling is most properly affirmed on the After-Acquired Title doctrine, the Bank shall address Appellant/Cross-Appellee Bradford E. Taylor ("Taylor")'s arguments on those issues first. The Bank shall subsequently address Taylor's arguments on the equitable doctrine of reformation.

SUMMARY OF ARGUMENTS

This case involves the relative priority of two deeds of trust recorded against the same property (hereinafter the "Property"). The Bank's deed of trust, dated June 2, 2006, was executed by Gary McDonald individually at a time when the Property was owned by his corporation, G&L Mac, Inc. The trial court granted the Bank priority over Taylor based upon Utah's After-Acquired Title statute and a December 22, 2006 special warranty deed from G&L Mac, Inc. to McDonald, individually. The trial court granted the Bank priority over Taylor's September 6, 2006 deed of trust, which was executed by G&L Mac, Inc. The trial court correctly found, pursuant to the After-Acquired Title doctrine, that title to the Property vested in the Bank's trustee "as if" title to the Property had been in Gary McDonald on June 2, 2006. The court ruled correctly because the statutes in question operate exactly as provided therein. Contrary to Taylor's arguments, the relation-back character of the After-Acquired Title doctrine fully contemplates intervening interests such as that of Taylor's. It does so by indulging a legal fiction that title is treated "as if" it was in McDonald on the date he executed the Bank's deed of trust. Under the doctrine, upon execution and recording of the December 22, 2006 special warranty deed, title to the Property passed *eo instanti* to the Bank's trustee. And, there is nothing exceptional or unusual in such a legal fiction. Indeed, Taylor simply offers the Court no reason why the doctrine and the statutes in question do not operate exactly as the language therein states.

On the other hand, the trial court erred when it denied the Bank's motion for partial summary judgment on its reformation theory. The admissible undisputed facts establish that both the Bank and McDonald intended, understood, and agreed that title to the Property would

be held in McDonald's name individually and that the Bank would have a first position deed of trust on the Property. Admissible and undisputed evidence establishes that the title company had the responsibility to obtain and record the special warranty deed on June 2, 2006, yet failed to do so. Based upon this scrivener's error of the closing officer, the Bank is entitled to a decree reforming the special warranty deed so as to be effective June 2, 2006, the date the parties entered into the loan agreement. And, even if the mistake was not technically a scrivener's error, the Bank is entitled to reformation based upon mutual mistake. Reformation is appropriate because the special warranty deed was given in performance of the parties' contract but is at variance with the parties' mutual intent.

Taylor's Statute of Frauds argument is not persuasive because the special warranty deed is an instrument executed by McDonald which satisfies the Statute. Taylor's equitable subrogation argument may be similarly dismissed because neither the Bank nor Taylor has asserted that theory in this appeal.

Next, Taylor was on actual, constructive, and inquiry notice of the Bank's interest in the Property at the time he took both his June 5, 2006 and September 6, 2006 deeds of trust. His interest is therefore subordinate to the Bank's interest.

Taylor had actual notice because his promissory note secured by his deed of trust states that the funds from the sale of the subdivision lots on the Property were to be paid first to the Bank, and only after the Bank was paid would Taylor be paid. Taylor had constructive notice of the Bank's June 2, 2006 deed of trust because notice of the contents of the deed of trust were imparted to Taylor upon recordation in the official records of the Salt Lake County Recorder's office. This notice included the fact that the Bank's deed of trust was executed by McDonald

individually, as opposed to G&L Mac, Inc. Taylor was on inquiry notice because both of his promissory notes as well as the public record alerted him to the Bank's interest. Under inquiry notice, Taylor is deemed conversant of all facts to which a reasonable inquiry would have led. The undisputed facts establish that if Taylor had inquired, the Bank would have told him it claimed a deed of trust upon in the Property.

Further, Taylor's three equitable arguments are not persuasive. The Bank took all reasonable steps to protect its interest by contracting with a title company. Even though Taylor asserts that he did all that he could do to avoid his loss by contracting with his title company, this does not relieve him from Utah' Race-Notice Recording Act, which provides that he who records first without notice and gives consideration takes over a subsequent taker with notice.

Lastly, Taylor's argument that he has priority over the Bank's interest because he recorded his September 2006 deed of trust before G&L Mac, Inc. conveyed the Property to McDonald through the special warranty deed on December 22, 2006, is not persuasive. This is so because to so hold would turn Utah's Race-Notice Recording Act into a Pure-Race Recording Act.

ARGUMENT

POINT I.

THE TRIAL COURT'S RULING ON AFTER-ACQUIRED TITLE SHOULD BE AFFIRMED.

A. TAYLOR COMPLETELY FAILS TO ADDRESS THE CRITICAL STATUTORY LANGUAGE AT ISSUE IN THIS APPEAL.

Taylor's argument is essentially that Utah's After-Acquired Title statutes at issue in this case, U.C.A. § 57-1-10 and U.C.A. § 57-1-20, do not contemplate intervening interests and do

not operate to inure in the Bank an interest superior to that of Taylor.[1] According to Taylor, this is because his September 2006 deed of trust was recorded before the December 2006 special warranty deed was recorded. Taylor's Reply Brief, Page 24. As such, Taylor's argument can be summarized as follows. The After-Acquired Title statutes, U.C.A. §§ 57-1-10- and 57-1-20, do not afford the Bank a priority over Taylor because Taylor obtained the September 6, 2006 deed of trust from G&L Mac, Inc. before G&L Mac, Inc. executed the December 22, 2006 special warranty deed in favor of Gary McDonald. According to Taylor, because McDonald took the special warranty deed from G&L Mac, Inc. after Taylor took his deed of trust, the Bank's interest, based upon the special warranty deed and its June 2006 deed of trust, is subject and subordinate to Taylor's September 2006 deed of trust.

As noted in the Bank's Appellee's Brief at Page 17, this is essentially a constructive notice argument. That is, Taylor asserts that because his deed of trust was executed by the owner of record title and recorded before the special warranty deed, the Bank was on constructive notice of Taylor's deed of trust under U.C.A. § 57-3-102 and is subordinate pursuant to U.C.A § 57-3-103. He explains this at Page 11 of his Appellant's Brief by stating:

> The qualifier "legal interest subsequently acquired," refers in plain English to the interest that the grantor subsequently acquired, and not to the interest that the grantor purportedly conveyed to the grantee before acquiring the interest.

At Page 24 of his Reply Brief, Taylor reaffirms his analysis by stating:

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[1] The Bank did not address U.C.A. § 57-1-20 before the trial court. However, because a trial court's ruling can be affirmed on any grounds apparent in the record, *Wall v. Morris*, 193 P.3d 1060 (Utah App. 2008), the Bank offered this statute in its Appellee's Brief as an additional rationale fully consistent with the trial court's ruling. And, Taylor has addressed the same statute in his Reply Brief.

> So even if the statute were applied, the result would be that the Bank would acquire an interest subject to that of Mr. Taylor (which is exactly what Mr. McDonald obtained), and the Bank would obtain such interest only by virtue of the statute artificially relating the conveyance back to June 2, 2006.

In making his argument however, Taylor completely ignores and omits any analysis or explanation of the operative language of U.C.A. § 57-1-10 and § 57-1-20. These statutes provide, 1) that "the [June 2, 2006 deed of trust] conveyance shall be as valid as if the legal estate had been in the grantor at the time of the conveyance" (U.C.A. § 57-1-10(1)(b)); and, 2) "[a]ll right, title, interest and claim in and to the trust property acquired by [McDonald] . . . subsequent to the execution of the [June 2, 2006] deed of trust shall inure to the trustee as security for the obligation or obligations for which the trust property is conveyed as if acquired before the execution of the deed of trust." (U.C.A. § 57-1-20).

Of critical importance in this matter, both of these statutes provide that the subsequently executed and recorded special warranty deed operates retroactively and vests title in the Bank's trustee "as if" title to the Property had been in McDonald at the time of the June 2006 deed of trust, or "as if" the Property had been acquired before the deed of trust was executed.

Taylor simply offers this Court no explanation as to why these two statutes do not operate exactly as the language provides. Rather, his argument simply ignores the statutory language that is central to the trial court's ruling and the question in this appeal.

B. THE STATUTES OPERATE EXACTLY AS PROVIDED THEREIN AND AFFORD THE BANK'S DEED OF TRUST A PRIORITY OVER TAYLOR'S DEED OF TRUST.

At the risk of being overly redundant, the Bank again directs the Court's attention to the two statutes at issue in this case. They provide as follows:

> (1) If any person conveys any real estate by conveyance purporting to convey the same in fee simple absolute, and at the time of the conveyance the person does not have the legal estate in the real estate, but afterwards acquires the same:
>
> (a) the legal estate subsequently acquired shall immediately pass to the grantee, the grantee's heirs, successors, or assigns; and
>
> (b) the conveyance shall be as valid as if the legal estate had been in the grantor at the time of the conveyance.
>
> (2)(a) Subsection (1) applies to a conveyance by:
> (i) warranty deed;
> (ii) special warranty deed; or
> (iii) trust deed.

U.C.A. § 57-1-10 (2006).

> All right, title, interest and claim in and to the trust property acquired by the trustor, or the trustor's successors in interest, subsequent to the execution of the deed of trust, shall inure to the trustee as security for the obligation or obligations for which the trust property is conveyed as if acquired before the execution of the trust deed.

U.C.A. § 57-1-20 (2001).

The critical portion of both statutes is the "as if" language. Each holds that once the special warranty deed was executed and recorded, title to the Property is treated "as if" it had been in McDonald on June 2, 2006. Hence, the "as if" language creates a legal fiction that the title to the property in question was vested in McDonald at the time of the Bank's June 2006 deed of trust.

Legal fictions involving relation-back doctrines are generally known and well recognized in the law. *E.g., Georgia Dept. of Community Health v. Medders*, 292 Ga. App. 439, 443, 664 S.E.2d 832, 835 (Ga. App. 2008) ("The relation-back language in OCGA § 53-1-20(g) creates the legal fiction necessary to allow estate property to "pass as if the person

renouncing had predeceased the decedent." OCGA § 53-1-20(f)(1); *Hamrick v. Bonner*, 182 Ga. App. 76, 78(4), 354 S.E.2d 687 (1987) (noting that relation-back effect of a marital annulment is a legal fiction); *In re Peery*, 40 B.R. 811, 815 (M.D. Tenn. 1984) (deeming similar relation-back language in Tennessee's renunciation statute "a legal fiction")).

Moreover, legal fictions are familiar in Utah law. *Free Motion Fitness, Inc. v. Wells Fargo Bank West, NA*, 208 P.3d 1066, 1075 (Utah App. 2009) ("Damages awarded for breach of contract should place the non-breaching party in as good a position as if the contract had been performed."); *Haran v. Escalante City*, 2010 WL 5452074, 1 (Utah App.) (Utah App. 2010) ("Despite the obvious inefficiency in the use of judicial resources, we consider a district court's review of a local land use authority's decision as if we were reviewing the land use authority's decision directly, affording no deference to the district court's decision.") (internal quotations and citations omitted).

As a consequence, there is nothing unusual or exceptional in the concept that upon execution and recording of the special warranty deed, title to the Property is treated "as if" it had been in McDonald on June 2, 2006.

C. U.C.A. §§ 57-1-10 AND 57-1-20 AND THE DOCTRINE OF INUREMENT CONTEMPLATE INTERVINING INTERESTS SUCH AS THAT OF TAYLOR.[2]

Notwithstanding Taylor's assertions at Page 24 of his Reply Brief, both U.C.A. § 57-1-10 and § 57-1-20 and the closely related doctrine of inurement fully contemplate intervening interests such as Taylor's. For example, U.C.A. § 57-1-10 states that upon execution of the

[2] To the extent that he infers that U.C.A. § 57-1-20 applies only to transfers in trust at Page 24 of his Reply Brief, Taylor is again wide of the mark. This statute is clearly part of Utah's trust deed statute U.C.A. § 57-1-19 through § 57-1-44.

subsequent deed, "the estate subsequently granted shall immediately pass to the grantee, the grantee's successors, or assigns . . . ." In pertinent part, U.C.A § 57-1-20 states: "All right, title, claim in and interest to the trust property acquired . . . subsequent to the execution of the deed of trust, shall inure to the trustee . . . ." The language of both statutes is consistent with the doctrine of inurement as explained in *American Law of Real Property*, Little Brown and Company, A. James Casner, Editor in Chief, (1952), § 15.22, (Title by Estoppel), at 849: on passage of title to a party who has previously conveyed, title goes *eo instanti* to his earlier grantee, its successors, or assigns.

Indeed, what is the purpose of the statutes if not to address intervening interests such as Taylor's? Why else does the doctrine of inurement hold, as U.C.A. §§ 57-1-10 and 57-1-20 clearly state, that upon execution of the special warranty deed, title to the Property is treated "as if" it was in McDonald on June 2, 2006? The only plausible answer to both of these questions is that the statutes and the doctrine are specifically designed to address intervening interests. Taylor's interest is addressed through the legal fiction that dictates that the special warranty deed relates back to June 2, 2006. When taken together, the "as if" language and the relation back doctrine compel the conclusion that the Bank's deed of trust is valid as of June 2, 2006, notwithstanding Taylor's intervening deed of trust. The result is that the Bank's deed of trust is treated as if title had been in McDonald on June 2, 2006, a time when Taylor's September 2006 deed of trust did not even exist and therefore, was not of record. As a consequence, the Bank's interest is prior and superior to Taylor's.

This is so because under the statutes and the doctrine, upon execution and recordation of the special warranty deed to McDonald as grantee, title went *eo instanti* to his grantee, the

Bank's trustee. As stated in the doctrine, there is not even the opportunity for title to vest in a subsequent grantee. Hence, both statutes and the doctrine provide that upon execution of the special warranty deed, title to the Property immediately passed to the Bank's trustee, as if title had been in McDonald on June 2, 2006. The doctrine addresses Taylor's intervening deed of trust by dictating that it is subordinate to that of the Bank. [3]

Taylor's assertion that the After-Acquired Title statutes, the inurement doctrine, and their relation-back character, do not contemplate intervening interests is therefore, not persuasive.

D. THE AUTHORITIES CITED BY THE BANK SUPPORT A RELATION-BACK ANALYSIS.

Contrary to Taylor's assertion at Page 24 of his Reply Brief, the Bank did in fact cite authority for the relation-back analysis. It did so in its Appellee's Brief at Page 15. Indeed, the Bank cited the exact same authority relied upon by Taylor at Page 14 of his Appellant's Brief. There, Taylor relies upon *American Law of Real Property*, Little Brown and Company, A. James Casner, Editor in Chief, (1952), § 15.22, (Title by Estoppel), at 851 (hereinafter "*Casner*"). Taylor relies upon this authority for the proposition that because the December 2006 special warranty deed was recorded after Taylor's September 2006 deed of trust, the special warranty deed is inferior to his deed of trust.

However, the section of *Casner* relied upon by Taylor does not address the issue in this case. It is clear that the language relied upon by Taylor addresses the application of the

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[3] Taylor is not technically a "subsequent grantee" because his deed of trust was executed by G&L Mac, Inc., not McDonald individually. Nonetheless, the foundational principle holds true. Upon execution of the special warranty deed from G&L Mac, Inc. to McDonald, title immediately passed, *eo instanti*, to the Bank's trustee.

doctrine of inurement in chain of title jurisdictions and to purchase money mortgages, which are not issues presented in this appeal. *Casner's* discussion relied upon by Taylor is as follows. The underlined portion is that quoted by Taylor at Pages 13-14 of his Appellant's Brief.

> § 15.22 -- Exception When Recording Act Conflicts.
>
> * * *
>
> But in many states a record made prior to the date at which a grantor acquires title is outside the chain of title and does not afford record notice to a purchaser from him, with the result that the subsequent purchaser takes title by virtue of protection of the recording act and there is no opportunity for the earlier grantee to take by inurement. On the same reasoning, one who receives a purchase-money mortgage as part of the transaction by which the title is acquired is not charged with notice of the prior record of an earlier deed or mortgage given by the new owner; any title which inures to the prior grantee and any lien which vests by inurement in the prior mortgagee will be subject to the lien of the purchase-money mortgage. A further reason for protecting the holder of the latter mortgage is that the doctrine can apply only to such title as a grantor subsequently acquires; if his obligation relates to the entire fee and he acquires a life estate only or merely a half interest, it is only these interests which can pass to his grantee by inurement: if he acquires title subject to a mortgage to a third party, it would pass in that form to his grantee. The same would be true if in his deed his grantor reserves a vendor's lien; and when instead the latter takes a purchase money mortgage, that, in effect, is just what he has done.

See, Casner, § 15.22 at 850-851, citations and footnotes omitted. This language from *Casner* makes sense in the context of chain of title jurisdictions and purchase money mortgages. As noted however, Utah is not a chain of title jurisdiction and Taylor's deed of trust was not a purchase money mortgage.

The more relevant language is found in an earlier section of *Casner* wherein he states:

> 15.21 Inurement of After-Acquired Title.
>
> * * *

> It is said that the title vests by operation of law, or by inurement, as soon as it is acquired by the grantor, without the need of judicial assistance. Where the doctrine is enforce, as now appears to be the case in most states, it applies irrespective of how the subsequent title is acquired . . . and regardless of whether the grantor assumed to convey that which he did not own by mistake or by fraud. It operates not only in favor of the grantee but for the benefit of any person claiming title under him by any form of transfer and binds not only the grantor but his heirs and donees and also purchasers from him who have notice of the conveyance which gives rise to the right.

Consistently,

> [a]pplication literally of the general principle that the estoppel binds not only the grantor but all those in privity with him would include a subsequent grantee who is a purchaser for value without notice of the prior conveyance on which the estoppel is founded. A number of cases have so held. This means that on passage of title to a party who has previously conveyed, title goes *eo instanti* to his earlier grantee or to that person's assigns, so that it cannot go to a present grantee even thought the latter lacks actual notice of the earlier conveyance and apparently should not be charged with record notice.

§ 15.22 at 849, citations and footnotes omitted.[4]

This language from *Casner* is damning to Taylor's position. This is because Taylor was on actual, constructive, and inquiry notice of the Bank's interest in the Property. Tellingly, the above language provides that the After-Acquired Title doctrine applies even if a subsequent grantee like Taylor did not have constructive notice. Based on *Casner*, and because the undisputed facts establish that Taylor was on constructive, actual, and inquiry notice of the Bank's interest,[5] there is even more reason to apply the doctrine against Taylor. That is

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[4] The Bank notes that this language pertains to conveyances of fee simple by deed. As the trial court correctly ruled, conveyances by deeds of trust are not a conveyance of fee simple title absolute. R. 1146. Some interest remains in the trustor after a trust deed is executed. Otherwise, all second and third position deeds of trust would be in doubt due to the want of a grantor.

[5] See Point IV., below.

because, if the doctrine operates against a subsequent taker without notice, in equity, there is even greater reason that it operates against one who has constructive, actual, and inquiry notice.

E. TAYLOR WAS ON CONSTRUCTIVE NOTICE OF THE BANK'S DEED OF TRUST EVEN THOUGH IT WAS EXECUTED BY McDONALD IN HIS INDIVIDUAL CAPACITY.

Further, and in yet another instance in which Taylor fails to answer the Bank's arguments, he does not address additional language from *Casner*. At Page 15 of its Appellee's Brief, addressing the precise issue in case, the Bank quotes *Casner* as follows:

> [T]here is a clash between the equally beneficent doctrines of estoppel [by deed] and of [constructive] notice. The only way to avoid it is by a judicial construction that the record of the earlier deed, prior to the execution and delivery of the later deed, is nevertheless record notice to the second purchaser in spite of the fact that at date of the record the deed was a nullity in whole or in part for lack of title in the grantor.

Casner, § 15.22, p. 849, n.3 (1952).

Even though Taylor fails to address this analysis, it is important to note that this language is entirely consistent with Utah's Recording Act, § U.C.A. 57-3-102, which provides that notice of the contents of a document is imparted upon recordation.[6] The logical extension of this analysis, which is fully compatable with *Casner*, leads to the conclusion that under the statute, the Bank's deed of trust imparted notice of its contents upon recordation even though it was executed by McDonald in his individual capacity. So, under both *Casner* and U.C.A. § 57-3-102, Taylor was on notice of the contents of the Bank's deed of trust from the time of

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[6] See Point V., below.

recording, irrespective of the fact that it was executed by McDonald individually, rather than in his capacity as president of G&L Mac, Inc.

F. CONCLUSION.

As a consequence, Taylor's arguments on the After-Acquired Title doctrine are not well taken. The trial court's analysis and holdings are fully consistent with the facts and law of this case, as well as the policy underlying the statutes, and should be affirmed.

POINT II.

THE TRIAL COURT ERRED IN DENYING THE BANK SUMMARY JUDGMENT ON ITS REFORMATION CLAIM.

While this appeal can be resolved most readily by affirming the trial court's ruling on the After-Acquired Title analysis, as an alternative position, the Bank asserts that the trial court erred in denying the Bank reformation of the special warranty deed so as to render the special warranty deed effective June 2, 2006.

As discussed in greater detail below, Taylor's brief endeavors to misdirect this Court's attention from the focal issues in this appeal by making a number of misstatements. For example, the Bank does not seek reformation of a deed that never existed as asserted at Page 3 of Taylor's Reply Brief. The undisputed facts establish that the special warranty deed "came into existence" on December 22, 2006. The Bank merely seeks to have this December 22, 2006 deed reformed to be effective as of June 2, 2006, consistent with the parties' mutual intent. Taylor also seeks to misdirect the Court's attention from the undisputed facts of this case by asserting that it was the Bank's responsibility to prepare the deed from G&L Mac, Inc. to Gary McDonald. Taylor's Reply Brief, Page 4. Yet, the undisputed facts establish that it

was the responsibility of the title company to obtain and record the title documents necessary to ensure that the Bank had a valid first position deed of trust on the Property.[7]

A. CONTRARY TO TAYLOR'S ARGUMENTS, THE BANK IS ENTITLED TO RELIEF REFORMING THE SPECIAL WARRANTY DEED TO BE EFFECTIVE AS OF JUNE 2, 2006, AS INTENDED BY THE PARTIES.

Generally, there are two grounds for reformation: mutual mistake of the parties, or ignorance or mistake by one party, coupled with fraud by the other party. *Hottinger v. Jensen*, 684 P. 2d 1271, 1273 (Utah 1984) ("Reformation of a deed is a proceeding in equity and is appropriate where the terms of the written instrument are mistaken in that they do not show the true intent of the agreement between the parties."). It is also undisputed that courts of equity allow reformation in the case of a mistake by a scrivener or a draftsman, as in this case, where by reason of a mistake on the part of the scrivener, a written agreement does not accurately reflect the intent of the parties. *Reformation of Instruments* § 19, 66 Am.Jur. 2d 243, (2001). Under the doctrine of scrivener's error, the mistake of a scrivener may be reformed based upon parol evidence. *Id.* Utah case law has long recognized this equitable concept. *Neilson v. Rucker*, 333 P.2d 1067 (Utah 1959) (A mistake in the names of the payees in an escrow was obviously a "scrivener's error").

Reformation is appropriate because the undisputed facts establish that the final executed documents in the transaction do not accurately reflect the parties' mutual intent.

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[7] See Point II. B., below.

1. McDonald Intended The Loan To Be A Personal Loan Secured By The Property.

The undisputed facts of record demonstrate that McDonald intended the loan to be a personal loan secured by the Property. R. 872, ¶ 16. The loan was not intended to be, and was not made, to G&L Mac, Inc., McDonald's corporation. McDonald's loan officer and agent, Eric Peterson, testified in his affidavit that both he and McDonald understood that McDonald was applying for a loan in McDonald's individual capacity. R. 872, ¶ 22. McDonald and his loan officer understood and agreed that the loan was to be secured by the Property, which was to be owned by McDonald, individually. R. 872, ¶ 22. Both McDonald and Stevenson understood that the purpose for the loan was, a) for McDonald to borrow enough money to finish paying for the Property and to pay off existing liens and encumbrances on the Property, b) the loan was to be a personal loan, secured by a first lien deed of trust on the Property that was to be owned by Mr. McDonald, personally, and c) the loan proceeds would be used to acquire the Property, clear title to the Property of all liens and encumbrances, and pay for the subdivision improvements to the Property. R. 872, ¶ 22. Accordingly, it is undisputed that McDonald intended the Property to be held in his name, individually, and for it to be security for the loan.

2. McDonald's Intent Is Established by Clear and Convincing Admissible Evidence.

At Page 25 of his Reply Brief, Taylor challenges the evidence of Gary McDonald's intent in applying for and accepting a loan from the Bank. For example, Taylor asserts that the testimony of McDonald's mortgage broker/agent, Eric Stevenson, is not admissible. However, all of the testimony establishing McDonald's intent is admissible under the Utah Rules of

Evidence. This is so because the testimony, 1) is not hearsay because it is offered to prove that a statement was made, not to prove the truth of the matter asserted therein, 2) it is evidence of verbal acts, or 3) it is both.

For example, Paragraph 9 states:

> 9. Mr. McDonald asked me to once again act on his behalf in finding financing for a loan to acquire and develop real property located in Riverton, Utah.

This statement is not offered to prove the truth of the matter asserted. Rather, it is offered to establish that Mr. McDonald made the statement. It was an offer by McDonald to Stevenson, for Stevenson to once again act as McDonald's broker/agent. This is a verbal act as in *Hydrite Chemical Co. v. Calumet Lubricants Co.*, 47 F.3d 887, 892 (C.A.7 Wis. 1995), where the court stated:

> The judge's rulings on statements made by Hormel to Hydrite during their settlement negotiations cannot be justified by reference to the hearsay rule. Hydrite did not wish to introduce this evidence in order to show that Hormel had sustained damages in excess of $2.25 million or had compelling grounds for extracting a settlement of that magnitude from Hydrite. It wanted to show only that, in light of the demands and supporting reasons pressed on it by Hormel, it had acted reasonably in settling the case for the amount that it did. For that purpose, it did not have to establish the truth of what Hormel had said - only that Hormel had said it. That was direct evidence, not hearsay, *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423 (7th Cir.1986), just as it is direct evidence, not hearsay, when a party to a dispute over a contract testifies to the offer or the acceptance made by the other contracting party. *Twin City Fire Ins. Co. v. Country Mutual Ins. Co.*, 23 F.3d 1175, 1182 (7th Cir.1994); 2 *McCormick on Evidence* § 249, p. 101 (4th ed., John William Strong ed. 1992).

In this case, the testimony of Stevenson was submitted to prove, 1) that McDonald offered to enter a contract where Stevenson was to act as his agent and, 2) that Stevenson accepted that

offer. This is not hearsay. It is evidence of verbal acts. As stated in *Black's Law Dictionary*, Sixth Edition (1990), Page 1558:

> Verbal acts. Situations in which legal consequences flow from the fact that words were said, *e.g.* the words of offer and acceptance which create a contract . . . . The rule against hearsay does not apply to proof of relevant verbal acts because the evidence of such acts is being offered to prove something other than the truth of an out of court assertion.

The same is true for Paragraphs 11, 12, 13, 14 and 15. R. 445. These paragraphs establish the offer and acceptance for a contract in which Stevenson acted as McDonald's broker/agent as well as the terms of a completely separate offer McDonald authorized Stevenson to make to the Bank. *See, McKelvey v. Hamilton,* 211 P.3d 390, 396 (Utah App. 2009) ("[W]ords with legal significance, such as words of contract, are considered verbal acts and are not hearsay.").

As a consequence, the testimony of Stevenson is admissible. The testimony establishes that McDonald offered to enter into a loan agreement with the Bank and that among the terms of the loan were that, 1) the loan was to be secured by a first deed of trust on the Property and, 2) that the Property was to be owned by McDonald in his individual capacity.

3. The Bank Intended The Loan To Be A Personal Loan Secured By The Property.

It is also undisputed that the Bank intended to make a personal loan to McDonald. R. 873-874, ¶¶ 29, 33, 37. The Bank understood that the loan was to be secured by the Property, which was to be owned by McDonald, individually. R. 874-875, ¶¶ 33, 38. The Bank did not bargain for and did not understand that the loan was to be secured by property owned by McDonald's corporation, G&L Mac, Inc. At each step in the loan approval process, the

representation was made to the Bank that the purpose for the loan was, a) for Mr. McDonald to borrow enough money to finish paying for the Property and to pay off existing liens and encumbrances on the Property, b) the loan was to be a personal loan, secured by a first lien deed of trust on the Property that was to be owned by Mr. McDonald, personally, and c) the loan proceeds would be used to acquire the Property, clear title to the Property of all liens and encumbrances, and pay for the subdivision improvements to the Property. R. 873, ¶¶ 29, 33, 44, 51, 77.

Hence, both McDonald and the Bank understood that the loan was made personally to McDonald and was to be secured by a first position deed of trust on the Property, which was to be held in McDonald's name, personally.

4. Even If The Facts In The Case Do Not Technically Amount To A Scrivener's Error, The Doctrine is Flexible, and the Undisputed Facts Establish Mutual Mistake For Which The Bank Is Entitled To Relief.

It is undisputed that a court may grant relief for a scrivener's error. *Reformation of Instruments*, § 19, 66 Am. Jur. 2d 243 (2001). Taylor argues and the trial court mistakenly found however, that the failure of the title company to prepare a deed was not a scrivener's error.[8] Yet, even if these facts do not technically amount to a scrivener's error, as demonstrated above, they unquestionably amount to mutual mistake.

Moreover, the doctrine is not as limited as Taylor argues or the trial court found. For example:

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[8] *See, Gonzales v. Strand Condominium*, 17 Misc. 3d 1139(A), 2007 WL 4336411 (N.Y. Supp. 2007, unreported disposition) (Page 7 of a contract was omitted "likely caused by a clerical error (tantamount to a 'scrivener's error') in photocopying or faxing the document.").

> While the right to have reformation is ordinarily limited to written agreements, the right of reformation is not restricted in its application to any class or kind of conventional instruments, with regard with to the form or the subject matter of the contract between the parties. Indeed the power extends to all written contracts and agreements, and it may be said that no valid written contract is beyond the reach of a court of equity for the purpose of reforming it.

Reformation of Instruments, § 28, 66 Am. Jur. 2d 252 (2001). A request to reform the December 2006 special warranty deed, so that the deed is effective the date the parties intended, is clearly within the equitable powers of a court. This is so because,

> [i]n general, where a written instrument does not express the true agreement and intention of the parties thereto, it may be reformed as to any material defect, whether the defect is in regard to a common-law or statutory requisite. Reformation may be had for a variance between a contract and the instrument which expresses it, *or a variance between a contract and an instrument given in performance of the contract.*

Id. at § 48, p. 265, (italics added).

Here, it is undisputed that the Bank entered into a contract for a loan with McDonald and that both parties intended the loan to be secured by the Property, which was to be held in McDonald in his individual capacity. R. 872, 873, 874, 876, 880, ¶¶ 22, 29, 33, 44, 77. Through an error however, the scrivener failed to have a special warranty deed executed until December 2006.

Importantly, albeit the special warranty deed was executed six months after the closing, it was nonetheless executed in performance of the contract between McDonald and the Bank. The purpose of the special warranty deed was to comply with the parties' mutual intent that the Property be held by McDonald individually. Reformation of the special warranty deed is appropriate because it was given "in performance of" the contract, but is at "variance" with the parties' mutual intent.

B. COMPETENT ADMISSIBLE EVIDENCE ESTABLISHES THAT IT WAS THE TITLE COMPANY'S RESPONSIBILITY TO OBTAIN A DEED FROM G&L MAC, INC. TO GARY McDONALD INDIVIDUALLY.

A dominant theme in Taylor's brief is the repeated, and inaccurate, assertion that the Bank was responsible for the preparation and recording of the title documents in this case and is therefore barred from seeking reformation. *E.g.,* Taylor's Reply Brief, Page 7, ("The Bank has declared that it prepares its own documents in transactions such as the one in dispute."). The undisputed facts however, are clear and to the contrary, notwithstanding Taylor's repeated mischaracterization of the same.

The undisputed facts are as follows:

> 114. Centennial Bank prepare[d] its own loan documentation, including the deed of trust. Affidavit of Jane Stevenson, ¶ 17. R. 564.
>
> 115. However, the Bank did not supply a deed necessary to vest title to the Property in McDonald. Affidavit of Jane Stevenson, ¶ 18. R. 564.
>
> 116. The Bank did not supply a deed to vest the Property in McDonald because it was the title company's responsibility to make sure appropriate documents [were] executed at closing so that title to the Property was properly vested and that the Bank's deed of trust was a first lien upon the Property. Affidavit of Cheryl Driscoll, ¶ 20. R. 530-531.

Bank's Statement of Facts, ¶¶ 114, 115, 116, R. 885. Importantly, Taylor does not dispute the truthfulness of these facts. He simply cites Paragraph 115 and ignores and disregards Paragraphs 114 and 116. He does so in the same manner that he relies upon U.C.A. § 57-1-10(a) and ignores and disregards U.C.A. § 57-1-10(b) in his After-Acquired Title analysis. *E.g.,* see Taylor's Appellant's Brief, Pages 10-14.

However, the undisputed facts before the Court, including Paragraph 116, make clear that the title company, not the Bank, was responsible to ensure that title to the Property was

vested in the name of McDonald. Indeed, and as noted, Taylor does not dispute the truthfulness of these facts. This is so because Taylor failed to raise any issue as to any of the Bank's facts in its memorandum in support of motion for partial summary judgment by offering any contradictory evidence. As a result, all of the Bank's facts are deemed admitted by Taylor under Rule 7(c)(3)(A) of the Utah Rules of Civil Procedure. *See, Victor Plastering, Inc. v. Citibank Federal Savings Bank*, 2009 WL 960403, Page 2, (Utah App. unpublished opinion). Hence, all of the Bank's facts are deemed admitted under the Rule.

Instead, Taylor challenged the admissibility of Paragraph 116 based on a lack of foundation. However, Taylor's evidentiary objection as to the foundation of Paragraph 116 (Driscoll Affidavit, Paragraph 20), R. 653, is not well taken. Ample foundation exists for the testimony of Ms. Driscoll. This is so because in pertinent part, Utah Rules of Evidence, Rule 602, provides as follows:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witnesses' own testimony.

Paragraph 1 of the Affidavit of Cheryl Driscoll states as follows:

> I am over the age of 18, of sound mind, and free of any improper influence, [and] can testify as to the matters stated herein of my own knowledge and experience.

Affidavit of Cheryl Driscoll, ¶ 1, R. 527. Driscoll also testified that she was employed by the Bank as its loan closer in May of 2006. ¶ 2, R. 527. She further testified that she was the Bank employee who prepared the loan documents, saw a loan package before it was sent to a title company for closing, and sends loan packages to title companies for closing. ¶ 3, R. 527. She testified that she was the last person to see a loan package before it went to a title

company. ¶ 4 R. 527. It was her job to protect the Bank by making sure that all pre-closing requirements were satisfied before she sent a loan to a title company for closing. ¶ 5, R. 528. She also testified that she was the last person who saw the loan package after it was returned from a title company but before the loan was funded. ¶ 6, R. 528. She testified that it was her job to protect the Bank and she took her job seriously. ¶ 8, R. 528.

Accordingly, there is ample evidence based upon Driscoll's personal knowledge, experience, and responsibilities as the Bank's loan closer to establish a foundation for her to testify that it was the title company's responsibility to prepare any deeds that were necessary to properly vest title in the Property in McDonald. Tellingly, Taylor never meaningfully challenged the foundation for Driscoll's testimony by noticing and taking her deposition.

Consistent with Driscoll's testimony are the additional facts; 1) that the closing was handled by the title company, not the Bank, R. 564-568; 2) that the Bank was not present at the closing, R. 564-568; 3) that after the closing, the title company returned the documents to the Bank, R. 567; 4) that because the Bank was not at the closing, before funding the loan, Ms. Driscoll required the First Lien Letter and examined the title commitment to ensure that the Bank's deed of trust was a first position deed of trust, R. 531.

The undisputed facts establish that it was the responsibility of the title company, not the Bank, to obtain the necessary title documents to ensure that the Bank's deed of trust was a valid first position deed of trust.

C. ADDITIONAL FACTS ESTABLISH THAT THE TITLE COMPANY WAS RESPONSIBLE TO OBTAIN THE NECESSARY TITLE DOCUMENTS TO PROPERLY VEST THE BANK'S DEED OF TRUST.

Because the loan was made to McDonald individually and the Property was to be held by McDonald individually, at the closing, the title company was to obtain whatever documents were required to vest title to the Property as agreed by the parties. This is what title companies do and the Bank utilized the title company for this exact purpose. Moreover, the fact that it was the title company's responsibility to ensure title to the Property was properly vested is confirmed by the further fact that it was the title company, not the Bank, which discovered the error and ultimately obtained the December 22, 2006, special warranty deed from G&L Mac, Inc. R. 568-569.

Even though Taylor does his best to disregard and ignore the undisputed facts in this record, there is no genuine issue as to any material fact that the title company was responsible to obtain whatever documents were necessary to ensure that title to the Property was properly vested. Further, there is ample foundation for Cheryl Driscoll's testimony on that point.

D. TAYLOR'S NEWLY ASSERTED STATUTE OF FRAUDS ARGUMENT IS NOT PERSUASIVE.

Taylor did not assert a Statute of Frauds argument before the trial court. Taylor's Memorandum in Opposition to the Bank's Motion For Partial Summary Judgment, Pages 1-11. R.917 through 928. Hence, Taylor presents this defense for the first time on appeal at Page 10 of his Cross-Appellee's Brief. For this reason alone, the Court should decline to hear argument on this affirmative defense, which Taylor must plead and has the burden of proving. *Miller v. Southern Pacific Railway*, 21 P. 2d 865 (Utah 1933).

Yet, even if this affirmative defense was properly before this Court, which it is not, Taylor's argument is not persuasive. His position is this: The December 22, 2006 special warranty deed was not executed on June 2, 2006 hence, it was not in existence at that time. Because the December 2006 special warranty deed did not exist in June of 2006, in Taylor's words, it is a "non-existent document". Because the December 2006 special warranty deed is a "non-existent document", it fails to comply with the Statute of Frauds and the Statute prevents the reformation of a non-existent document.

This argument is nonsensical. The argument is that the deed cannot be reformed because it did not exist on June 2, 2006. This is nonsensical because if the deed had existed on June 2, 2006, there would be no need to reform it. Additionally, there is a material difference between creating a document that does not exist and changing one that is in existence. While the law is clear that a court cannot create a contract that was not agreed upon by the parties, it is equally clear that a court may reform an existing document that does not correctly reflect the parties' mutual intent. In this case, the special warranty clearly exists and was executed pursuant to the parties' agreement. The Court may reform it because it was "given in performance of" the parties' June 2, 2006 contract, but is at "variance" with the parties' mutual intent. *See, Reformation of Instruments*, § 28, 66 Am. Jur. 2d 252 (2001) at Page 20, above.

More to the point however, the deed was executed, recorded, and came into existence in December of 2006. There is no question that at that time, G&L Mac, Inc. conveyed the Property to Gary McDonald, individually, in a written deed signed by G&L Mac, Inc. This deed clearly satisfies the Statute of Frauds. Accordingly, Taylor's Statute of Frauds argument fails because it is founded on the premise that there is no written document signed by G&L

Mac, Inc. that conveys the Property from G&L Mac, Inc. to McDonald. Notwithstanding Taylor's nonsensical argument, the special warranty deed is clearly a deed which came into existence in December of 2006 and satisfies the Statute of Frauds.

POINT III.

THE DOCTRINE OF EQUITABLE SUBROGATION IS NOT BEFORE THIS COURT.

Neither the Bank's, nor Taylor's, claim of equitable subrogation raised in the trial court is before this Court. Neither the Bank, nor Taylor, identified equitable subrogation as an issue in their docketing statements or in their principal briefs in this appeal. Taylor did not raise this issue in his Appellant's Brief and the Bank did not raise the issue in its Cross-Appellant's Brief. The issue is simply not before this Court.

POINT IV.

TAYLOR WAS ON ACTUAL, CONSTRUCTIVE, AND INQUIRY NOTICE OF THE BANK'S INTEREST IN THE PROPERTY.

Next, Taylor presents the argument that he did not have actual or constructive notice of the Bank's interest in the Property on June 1, 2006, the date he loaned money to Gary McDonald. Taylor's Reply Brief, Page 17. This argument is not credible. The undisputed facts establish that Taylor did in fact have actual notice of the Bank's interest on that date. Indeed, the fallacy of Taylor's assertion is proven by his own signature on the promissory note, which he "read and approved" and "accepted" from McDonald. This note is dated June 1, 2006, and is signed by Taylor, and states as follows:

PROCEEDS FROM THE SALE OF THE ANY LOTS (sic) SHALL BE DISBURSED FIRST TO CENTENNIAL BANK AND ANY AND ALL REMAINING FUNDS SHALL BE DISBURSED TO BRAD E. TAYLOR.[9]

In addition to being on actual notice, Taylor was also on inquiry notice. He is therefore deemed to know any facts which would be revealed by a reasonable inquiry. *O'Dea v. Olea*, 217 P.3d 704, 714 (Utah, 2009) ("It is well established that whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. In other words, when a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.") (internal quotation marks, punctuation, and citations omitted.) The undisputed facts establish that if Taylor had asked the Bank about its interest in the Property, the Bank would have advised him that it claimed an interest through the deed of trust. R. 496.[10]

Also, there is no genuine issue as to any fact about Taylor's constructive notice of the Bank's interest after the recording of the Bank's deed of trust on June 2, 2006. Taylor argues however, that he took his interest in the Property on June 1, 2006, the date he loaned money to McDonald. Taylor's Reply Brief, Page 18. This assertion evidences a disregard of the fundamental concepts of real estate finance law, the legal issues in this case, and Utah's Race-Notice Recording Act. Under Utah's Race-Notice Recording Act, U.C.A. § 57-3-103, as

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[9] Taylor's promissory note, dated September 1, 2006, has substantially the same language.

[10] Taylor's objection of speculation as to this testimony, R. 682, is not well taken. This is so because the witness testified based upon her own knowledge and experience. The witness held the position of Assistant Vice President and Senior Loan Underwriter with the Bank, R. 492-497, knew that the Bank held a deed of trust upon the Property, and testified that if asked, she would have told anyone that the Bank claimed a deed of trust on the Property. The subject matter of her testimony is well within her personal knowledge and experience.

between two purchasers of real property, the first to validly record a conveyance and take the property without notice of a prior interest in the property takes the property over a purchaser who subsequently records a deed. *Ault v. Holden*, 44 P.3d 781 (Utah 2002).

In Utah, a deed of trust is a conveyance of real property. *First Sec. Bank of Utah, N.A. v. Banberry Crossing*, 780 P.2d 1253, 1256 (Utah, 1989) ("A trust deed is similar to a mortgage in that it is given as security for the performance of an obligation. However, a trust deed is a conveyance by which title to the trust property passes to the trustee."). Hence, the first to record a deed of trust without notice of a prior interest takes the property over a lender who, as in the case of Taylor, recorded subsequently with actual, constructive, and inquiry notice of the Bank's interest. So, it makes no difference when Taylor loaned his money to McDonald. The material questions are, 1) when did Taylor record his deed of trust and, 2) did Taylor have notice of the Bank's interest at the time of his recording?

The answers to these questions are undisputed; 1) Taylor recorded his deed of trust after the Bank's deed of trust was recorded and, 2) Taylor had constructive, actual, and was on inquiry notice of the Bank's interest. As such, Taylor recorded his trust deed subsequent to the Bank's and had notice of the Bank's interest at the time he took his interest in the Property. It makes no difference when Taylor loaned his money to McDonald.

POINT V.

THE BANK'S DEED OF TRUST IMPARTED NOTICE OF ITS CONTENTS FROM THE TIME OF ITS RECORDING.

A very similar analysis reveals that Taylor's argument that the Bank's deed of trust does not impart notice because it is a "wild deed" is well wide of the mark. This is the case for at least four reasons.

First, under Utah's Race-Notice Recording Act, notice of the contents of the June 2006 deed of trust are imparted upon recordation. U.C.A. § 57-1-102. [11] In this case, the contents of the deed of trust indicate that Gary McDonald intended to convey the Property to the Bank. The contents of the document establish that McDonald executed the deed in his individual capacity. The record title to the Property also revealed that the Property was owned by G&L Mac, Inc. These facts gave rise to a duty to inquire on Taylor's part.

Salt Lake County v. Metro West Ready Mix, Inc., 89 P.3d 155, 159 (Utah 2004) is instructive on this point. It states as follows:

> [O]ne who deals with real property is charged with notice of what is shown by the records of the county recorder of the county in which the property is situated and by implication is charged with notice of what the records should show but do not, i.e. a lack of record title in the grantor . . . .

Here, Taylor took his September 2006 deed of trust after the Bank's deed of trust and is charged with whatever was shown by the records of the Salt Lake County Recorder, including the fact that the Bank's deed of trust was executed by McDonald individually when the

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[11] *But see In re: Hiseman*, 330 B.R. 251 (Utah Bkrptcy. 2005) (Bankruptcy trustee not on notice even though deed of trust was recorded and properly indexed in the grantee/grantor index because deed of trust was not properly abstracted to tract index due to error in legal description.)

Property was owned by G&L Mac, Inc. As in *Metro West*, 89 P.3d at 159, Taylor was on notice of the "lack of record title in a grantor." And, it is undisputed that if Taylor had inquired of the Bank, it would have advised him that it claimed a deed of trust on the Property, notwithstanding the defect therein. Hence, Taylor is on notice of the Bank's interest in the Property.

Next, Utah is not a chain of title jurisdiction. Therefore, this is not a case where the deed of trust does not give notice because it is outside the chain of title, as would be the case if Utah were a chain of title jurisdiction like Colorado. As explained at Page 23 of the Bank's Appellee's Brief, U.C.A. § 17-21-6(f) and § 17-21-6(3) require each county recorder to keep a tract index through which all documents that pertain to each parcel of land can be identified. And, the undisputed facts establish that a reasonable title search would have revealed the Bank's deed of trust.

The Bank's analysis is also entirely consistent with *Casner*, which as discussed above, states that these circumstances require a judicial construction that the Bank's deed of trust is notice to Taylor despite the fact that at the date of the Bank's deed of trust it "was a nullity in whole or in part for lack of title in the grantor."

Finally, the June 2006 deed of trust is not a "wild deed" as in *Salt Lake County v. Metro West Ready Mix, Inc.*, 89 P.3d 155 (Utah 2004). In that case, a deed was given Metro West by the Tingeys. The Tingeys did not have record title to the property, which was located in Utah County, but abutted the Salt Lake County boundary line. A deed to Salt Lake County had been recorded in the Salt Lake County Recorder's office but was not recorded in Utah County where the property was located. Hence, the Utah County records revealed that the Tingeys had no

record title to the property. The Court described the deed from Tingey's to Metro West as a wild deed, because it was executed by a stranger to title with no record ownership of the interest.

In contrast to the Tingey deed in *Metro West*, the Bank's deed of trust was recorded and properly indexed in the county in which the property was "situated". *See, Id.* at 159. Record title to the Property was in G&L Mac, Inc. Gary McDonald was the president of G&L Mac, Inc., a Utah corporation. In that capacity, he clearly had a record interest in the Property. Accordingly, the Bank's deed of trust is not a "wild deed."

Taylor's assertion that the Bank's deed of trust is a wild deed is therefore wide of the mark.[12]

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[12] Taylor's extensive footnote at Pages 19-20 of his Reply Brief does not assist his position. Notably, the cases criticized by Taylor in the footnote are those relied upon by him at Page 18 of his Appellant's Brief, for the proposition that he did not have notice of the Bank's deed of trust. Taylor initially relied upon these cases to support his assertion that the Bank's deed of trust was invalid and therefore did not give notice. Taylor asserted: "Recording of an invalid deed does not serve as notice." Appellant's Brief, Page 18. The cases were not relied upon by the Bank. The Bank merely demonstrated in its Appellee's Brief that each case indicated that a defective deed can provide notice. Now Taylor has changed his position and agrees that an "invalid deed" gives notice. And, even though it was Taylor who initially relied upon the cases, he now asserts that the cases have no applicability here. According to Taylor, this is because the defects in the notarization of the deeds in those cases did not affect the deed's ability to convey title or give constructive notice. Now he argues that a void deed does not give notice because it does not convey title. He has now changed his position and asserts that a void deed is different from an invalid deed. The Bank fully addresses these questions herein. Utah's Race-Notice Recording Act states that notice of the contents of an instrument are imparted upon recordation. The doctrine of inquiry notice requires a reasonable inquiry based upon what a party interested in a particular parcel of real estate discovers in the contents of documents of record. And, *Metro West* holds that a party is bound by what the public record should show, but does not.

POINT VI.

TAYLOR'S EQUITABLE ARGUMENTS ARE NOT MERIT WORTHY.

Beginning at Page 20 of his Reply Brief, Taylor makes three equitable arguments in support of his position. None are merit worthy.

First, Taylor argues that the Bank could have avoided its loss because it prepares its own documents and should have prepared a deed from G&L Mac, Inc. to McDonald. As demonstrated above however, the undisputed facts establish that it was the responsibility of the title company to prepare whatever documents were necessary to vest title to the Property in the fashion the parties had previously agreed.

Second, Taylor asserts that he did what he could to avoid his loss. He says he did so by contracting with a title company and instructing that title company to record his deed of trust before they disbursed his funds. While this may all be true, it does not extract Taylor from the well-established law that he who records first without notice or knowledge and has given consideration, takes over a subsequent taker.

Next, Taylor urges in equity that he was more vigilant than the Bank because he learned of the mistake in his June 5, 2006 deed of trust, and secured his September 6, 2006 deed of trust before the title company secured the December 22, 2006 special warranty deed. As noted in the Bank's Appellee's Brief, this argument simply fails to recognize the significance of Utah's Race-Notice Recording Act. If accepted, Taylor's argument would turn Utah's Race-Notice Recording Act into a Pure-Race recording act. That is, he who gets to the recorder's office first wins, irrespective of notice or knowledge. Utah clearly has not adopted this type of recording act.

CONCLUSION

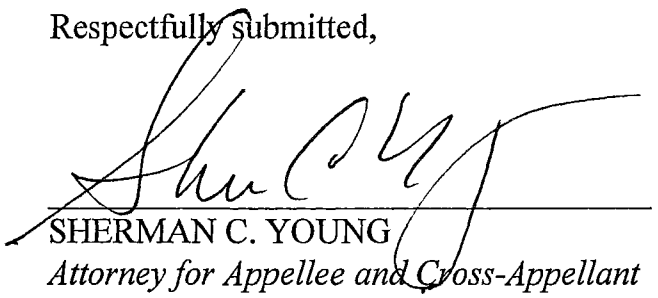
In this appeal between two competing deeds of trust recorded against the same property, the trial court correctly ruled that under the After-Acquired Title doctrine, that the Bank's June 2006 deed of trust has priority over Taylor's September 2006 deed of trust, even though the June deed of trust was executed by McDonald at a time when record title was in his corporation, G&L Mac, Inc. Under U.C.A. §§ 57-1-10, 57-1-20, and the doctrine of inurement, once the December 2006 special warranty deed was executed and recorded, title to the Property went *eo instanti* to the Bank's trustee. Pursuant to the After-Acquired Title doctrine, the special warranty deed relates back to June 2, 2006, the date the Bank's deed of trust was executed by McDonald.

As an alternative theory, the Bank is entitled to a decree of reformation reforming the special warranty deed to be effective June 2, 2006, the date the parties intended. The only reason a deed was not executed on that date was because of an error by the title company, not an error by either the Bank or McDonald. Moreover, Taylor was on actual, constructive, and inquiry notice of the Bank's interest in the Property when he took his September 2006 deed of trust. Taylor's interest is therefore inferior thereto and he cannot bar reformation. Finally, Taylor's equitable subrogation, Statute of Frauds, and other equitable arguments are not persuasive.

Accordingly, this Court should affirm the trial court's ruling on the After-Acquired Title issues and should reverse the trial court's ruling on the Bank's reformation claim.

DATED this 29 day of March, 2011.

Respectfully submitted,



SHERMAN C. YOUNG
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MAILING CERTIFICATE

I HEREBY CERTIFY that on the 31 day of March, 2011, I caused to be mailed the foregoing **REPLY BRIEF OF APPELLEE/CROSS-APPELLANT FEDERAL DEPOSIT INSURANCE CORPORATION** by depositing a true and correct copy in the U.S. Mail, first-class postage prepaid, and addressed as follows:

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